

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

03/08/2002

CLERK OF THE COURT  
FORM V000A

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

CV 2001-092061

FILED: \_\_\_\_\_

HAMILTON HOMES TEMPE HOA

JAMES H HAZLEWOOD

v.

JOHN TAYLOR

TIM D COKER

CHANDLER JUSTICE COURT

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and this Court has considered and reviewed the record of the proceedings from the Chandler Justice Court, the exhibits made of record, and the Memoranda submitted by counsel.

This case proceeded to trial on May 3, 2001 on Appellee, Hamilton Homes Tempe Hoa's, claim for unpaid Homeowners Association fees, late charges, penalties and processing assessments. At the conclusion of the trial in a minute entry dated May 21, 2001, the trial court stated that Appellant had timely filed a counterclaim in this case, that the trial court acknowledged it erred in refusing to permit testimony or evidence on that counterclaim at the trial. In a conscientious minute entry ruling, the court apologized for its error and reset additional trial on Appellant's counterclaim. Thereafter a trial was held on Appellant's counterclaim on July 19, 2001.

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The trial court found in Appellee's favor and granted judgment in the amount of \$323.00 for past due assessments, attorneys' fees of \$3,716.50, and costs of \$55.10, and costs incurred in filing the lawsuit of \$41.00. The trial judge granted Appellee's Motion for a directed verdict as to Appellant's counterclaim. The counterclaim was dismissed. The formal judgment was signed August 8, 2001 and Appellant has filed a timely Notice of Appeal in this case.

The first error alleged by Appellant concerns the "severance" of trial on the issues of Appellee's original claim and Appellant's counterclaim. Appellant claims that this severance prejudiced him. Appellant contends that "both parties were ready to go and the witnesses were all present to answer any questions that might have arisen in the counterclaim."<sup>1</sup> This Court rejects that contention as Appellant makes no claim that the witnesses were unavailable for the later trial date of July 19, 2001. Any and all witnesses which might have been necessary to prove Appellant's counterclaim were subject to subpoena just as they were subject to subpoena for the original trial date. In fact, Appellant does not claim that any specific witness or evidence was unavailable to him at the later trial date. Appellant does claim that because of the withdrawal of his attorney at the time set for the continued trial on July 19, 2001, he was prejudiced. Knowing that a firm trial date was scheduled, Appellant had every opportunity to ensure his original attorney's attendance or to seek substitute counsel prior to that trial date. This Court finds that Appellant was not prejudiced by the trial court's continuation of the trial to July 19, 2001 for trial on Appellant's counterclaim.

Next Appellant claims that the subsequent sale of his property extinguished any liens that Appellee's may have had. Appellee contends that Appellant has waived this issue by his failure to raise the issue before the trial court. Generally, the failure to make an objection or raise an issue during the

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<sup>1</sup> Appellant's Opening Brief, at page 5.  
Docket Code 019

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trial constitutes a waiver of that issue on appeal in the absence of fundamental error.<sup>2</sup>

Finally, Appellant contends that the trial court improperly granted Appellee's Motion for a Directed Verdict on Appellant's counterclaim, that the trial court erred in awarding attorney's fees and out of pocket expenses. This Court finds those allegations to be without merit.

This Court has reviewed the record to ensure that substantial evidence is admitted in support of Appellee's claims. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.<sup>3</sup> All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.<sup>4</sup> If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.<sup>5</sup> An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.<sup>6</sup> When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the

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<sup>2</sup> See State v. Van Adams, 194 Ariz. 408, 984 P.2d 16, cert.denied, 120 S.Ct. 1199, 145 L.Ed. 2d 1102 (1999).

<sup>3</sup> State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

<sup>4</sup> State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

<sup>5</sup> State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

<sup>6</sup> In re: Estate of Shumway, 197 Ariz. 57, 3 P.3<sup>rd</sup> 977, review granted in part, opinion vacated in part 9 P.3<sup>rd</sup> 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

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action of the lower court.<sup>7</sup> The Arizona Supreme Court has explained in State v. Tison<sup>8</sup> that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.<sup>9</sup>

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED affirming the judgment entered by the Chandler Justice Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Chandler Justice Court for all further and future proceedings with the exception of attorneys' fees and costs on appeal.

IT IS FURTHER ORDERED that counsel for Appellee shall submit an Application and Affidavit for attorneys' fees and costs incurred in this appeal to this Court with copies to counsel for Appellant on or before April 8, 2002.

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<sup>7</sup> Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

<sup>8</sup> SUPRA.

<sup>9</sup> Id. At 553, 633 P.2d at 362.